

No. 14401.

IN THE

United States Court of Appeals FOR THE NINTH CIRCUIT

HIAKA SUDA,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United
States,

Appellee.

Appeal From the United States District Court for the
District of Hawaii.

APPELLANT'S OPENING BRIEF.

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No. 14461.

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FOR THE NINTH CIRCUIT

HITAKA SUDA,

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vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

The issue in this case is similar to that in *Fujii v. Dulles*, No. 14460 in this court. There is a factual difference which should not, but may, be a ground for distinction between the two cases. Appellant's Opening Brief in the *Fujii* case is being filed at the same time as this brief. Counsel for appellant and appellee in both cases are the same. Accordingly, to save the time of the court and counsel, and to save expense, the argument made in the *Fujii* brief will not be repeated here, but is referred to herewith and incorporated herein by reference.¹

¹Counsel for appellant have been advised by the Clerk of this Court that this procedure is satisfactory.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This action was brought under 8 U. S. C. 903 for a declaration that plaintiff is a national and citizen of the United States. [R. 4.]

The appeal [R. 43] is from an Order of Dismissal made on the ground that at the time suit was filed plaintiff had not been denied a passport or other right or privilege as a citizen of the United States. [R. 39.] The Order of Dismissal was made not after trial, but in granting defendant's motion to dismiss before trial and after answer filed. [R. 29.]

The District Court had jurisdiction under 8 U. S. C. 903. The Order of Dismissal was filed on June 29, 1954. Notice of Appeal was filed on July 1, 1954. This court has jurisdiction to review under 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Plaintiff filed the original complaint on December 23, 1952. [R. 6.] On March 18, 1954, plaintiff filed an amended complaint, as of course, under Rule 15(a), Federal Rules of Civil Procedure, no responsive pleading having been served or filed. [R. 10-12.] On March 22, 1954, defendant filed his answer containing only admissions and denials and no other defense. [R. 28.] Thereafter, on April 23, 1954, defendant filed a motion to dismiss on two grounds: (1) under Rule 12(b)(6), F. R. C. P. for failure to state a claim upon which relief can be granted, and (2) under Rule 12(b)(1), for lack of jurisdiction over the subject matter.

Statute Involved.

8 U. S. C. 903 provides in pertinent part:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person . . . may institute an action against the head of such Department or agency in the . . . district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

Facts.

There is no question in this case as to the right of plaintiff to have filed his amended complaint. The pertinent facts alleged in the amended complaint, deemed admitted by the motion to dismiss, are these.

Plaintiff was born in Hawaii on August 9, 1909. [R. 10.] And, therefore, he was born a citizen of the United States. (14th Amend. to U. S. Const.)

On or about November 4, 1952, plaintiff applied at the office of the American Vice-Consul in Kobe, Japan, for a passport to return to the United States as a citizen thereof. [R. 10.]

Said application for passport was denied plaintiff by the Vice-Consul on the ground that plaintiff had lost his United States citizenship under 8 U. S. C. 801(c) by reason of plaintiff having served in the Japanese Armed Forces, and instead, on November 25, 1952, the Vice-Consul, under his official seal as Vice-Consul of the United States, executed as to plaintiff a Certificate of the Loss of the Nationality of the United States on the same ground. [R. 11.]

This action by the Vice-Consul was approved by the Washington Office of the Department of State on December 18, 1952. [R. 11.]

Plaintiff claims Hawaii as his permanent residence. [R. 10.]

Plaintiff prayed for judgment that he is a national of the United States. [R. 11.]

In the face of these allegations, the court dismissed the action. [R. 39.]

Specification of Errors.

1. The court erred in dismissing the action;
2. The complaint stated a claim upon which relief can be granted;
3. The court had jurisdiction over the subject matter.

Argument.

No summary of argument is being submitted because the Argument itself is short.

Unlike the *Fujii* case, above referred to, the action of the Washington office of the Department of State was completed (December 18, 1952) [R. 11] before the original complaint was filed. (December 23, 1952.) [R. 6.] Accordingly, under Rule 15(c), F. R. C. P., all the allegations of the amended complaint speak as of the date of the filing of the original complaint, December 23, 1952.

The District Court rendered an oral opinion in which it explained its reasoning. [R. 35-37.] As in the *Fujii* case, the gist of its argument is found in these words. [R. 36-37]:

“. . . There is no allegation that the Certificate of Loss of Nationality dated November 25, 1952, approved by the Department of State December 18, 1952, was communicated to the plaintiff within the life of the statute sought to here by (*sic*) invoked.

“. . . The word concerning the issuance of the Certificate of Loss of Nationality has to be clearcut and unambiguous and communicated officially to the plaintiff.”

The fallacy of this requirement, and the lack of authority in the court to add to and amend the statute, has been previously briefed in the *Fujii* brief.

One further observation by the court requires comment here. The court said [R. 36]:

“Paragraph (IV of the amended complaint) lacks a definitive declaration of the time when the passport application was denied.”

But there is no requirement, either in 8 U. S. C. 903 or in the rules of pleading which require a definite date to be set out.²

²All that the complaint need show is (1) a short and plain statement of the grounds upon which the court's jurisdiction depends; (2) a short and plain statement showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief to which he deems himself entitled. (Rule 8(a), FRCP.) We do not burden the court with citations for such basic propositions under the new rules as: it is proper to plead conclusions, the complaint need only give fair notice to the opposite party of the nature of the claim, ultimate facts and details of evidence need not be shown, all doubts and ambiguities must be resolved in favor of the claim attempted to be stated, upon a motion to dismiss the court must treat every properly pleaded allegation of fact as true.

In this complaint in alleging that the Vice-Consul denied plaintiff's application for passport, plaintiff practically followed the language of the statute. This is sufficient. (*Card v. Elmer C. Brewer, Inc.*, 42 Fed. Supp. 701 (D. C. Or., 1941); *Securities and Exchange Commission v. Timetrust*, 28 Fed. Supp. 34, 42 (D. C. N. D. Cal., 1939).

The amended complaint spoke as of December 23, 1952 and prior thereto. Thus, the pleading stated that prior to December 23, 1952, November 4, 1952, to be exact [R. 10] the plaintiff applied at the office of the American Vice-Consul in Kobe, Japan for a passport to return to the United States [R. 10] and that "said application was denied plaintiff by said Vice-Consul on the ground that plaintiff lost his United States citizenship under 8 U. S. C. 801(c)." (Italics added.) This alone was enough to state a claim under 8 U. S. C. 903. (*Wong Wing Foo v. Dulles*, 196 F. 2d 120, 122 (C. A. 9, 1952).)

It is manifest that the American Consular officers in Japan considered the requirements of 8 U. S. C. 903 to have been met. They issued to plaintiff a Certificate of Identity under the statute to come to the United States, which plaintiff did and was ready for trial. [R. 15, 17, 19, 21, 24, 27.] And it is also manifest that the Washington office of the Department of State, as well as of the Department of Justice, never questioned the correctness of the consular officers having done so. [R. 20, 22, 23, 26.]

Accordingly, there was no basis for the court's dismissing the case.

Conclusion.

The order of dismissal should be set aside and the case permitted to go to trial.

Respectfully submitted,

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